TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~375~~. 95

THOMAS GREEN, JAMES GREEN, GEORGE W. WELLS, AND WILLIAM A. WARD, APPELLANTS,

vs.

CATHARINE GREEN, MARY CATHARINE GREEN, AND ALICE GREEN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 17, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 375.

THOMAS GREEN, JAMES GREEN, GEORGE W. WELLS, AND WILLIAM A. WARD, APPELLANTS,

vs.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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2 *Original bill.—Filed Dec'r 1st, 1870.*

Supreme court of the District of Columbia.

CATHARINE GREEN, MARY CATHARINE Green, and Alice Green, complainants,
vs.
THOMAS GREEN, JAMES GREEN, GEO. W. Wells, and W'm A. Ward, defendants.

No. 2197. Equity docket 10.

The complainants shew:

1. The said Catharine Green is the wife of said Thomas Green, and said Mary Catharine and Alice Green are the children of said Thomas and Catherine, and are under age, and all said complainants bring this suit by their next friend Gormley.

2. All said parties are resident of the District of Columbia.

3 3. On the 15th of January, 1867, said Thomas Green conveyed certain property, situated in Georgetown and Washington, to said James Green, his heirs, and assigns, in trust for the sole and separate use of said Catharine Green, and for the children of said Catharine and Thomas, during her life, free from the control of her husband and from any liability for his debts, and to hold and dispose of and convey in such manner and to such uses as she, said Catharine, might direct by any last will and testament, and in the absence of any such limitation or appointment by her, or subject thereto in remainder after her death to her heirs-at-law. For a particular description of the property reference is made to a certified copy of said deed which is herewith filed marked Exhibit G 1.

4. Complainants are advised that, according to the true construction of said deed of settlement, said Catharine Green was entitled only to an estate for life in said premises as joint tenant or tenant in common with her children, with a power to appoint the fee-simple therein after her death by last will and testament; that no power was reserved to

4 her to appoint or limit the same by deed, nor was the trustee authorized to convey in pursuance of any such direction and appointment, nor was the said Catharine authorized by said deed to make any conveyance of said premises.

5. Nevertheless, the said Catharine was induced improvidently to attempt the execution of said power of appointment, by deed, and for that purpose, on the * day of , 1868, joined in a deed made by her trustee, said James Green, which purported to convey said property to William A. Ward, in trust to secure the payment of a certain debt of her husband, said Thomas Green, to George W. Wells, a copy of which deed is herewith filed as part hereof, marked Exhibit G 2.

6. The said debt of Thomas Green being overdue, the said W'm A. Ward, as trustee, has advertised the said premises for sale, in pursuance of the terms of said deed of trust.

5 7. Complainants are advised that said deed of trust is utterly void in equity, being wholly unauthorized by the terms of the settlement to the use of the complainants; that it was not so executed as to pass even the interest of said Catharine Green in said property, but in no event could it be effectual to pass more than her undivided interest for the term of her life.

8. Nevertheless, said deed of trust to Ward may be held to pass the legal title in fee-simple in said property, and any purchaser under said

deed may be held to acquire the legal title, and would then be enabled to maintain an ejectment for said property, against which complainants, however entitled in equity, might not be able to oppose a legal bar, and thus irreparable injury might result to them if the sale shall be allowed to proceed, as advertised by said trustee.

9. They, therefore, pray:

1. That your honors will grant the usual writ of subpœna against said defendants.

2. That the said deed of trust to William A. Ward may be declared void, and set aside.

6 3. That the rights of complainants, under the deed of settlement aforesaid, may be construed and ascertained by your hon. court.

4. That the said W'm A. Ward may be enjoined and prohibited from selling, or attempting to sell, any part of the property described in the deed of trust to him from said James, Thomas, and Catharine Green, under the authority of said deed.

5. And that your honors may grant such other and further relief in the premises as may be just and equitable.

CATHARINE GREEN.

WALTER S. COX, *Solicitor.*

DISTRICT OF COLUMBIA,
County of Washington, sct.:

On this 1' day of December, A. D. 1870, before the subscriber, a justice of the peace in and for the county aforesaid, personally appears Mrs. Catharine Green, and makes oath, on the Holy Evangely, &c., that the matters stated in the aforegoing answer are true, to the best of her knowledge, information, and belief.

W'M MARTIN, *J. P.*

7 *Exhibit G* 1, *to bill.*

THOMAS GREEN *to* JAMES GREEN. } Trust. Recorded January 15, 1867.

This indenture, made on this 15th day of January, in the year one thousand eight hundred and sixty-seven, between Thomas Green, of the city of Washington in the District of Columbia, of the first part, and James Green, of the city of Washington, of the second part. Witnesseth: That the said Thomas Green, for and in consideration of the love and affection for his wife, Catherine Green, and for the lawful heirs lawfully begotten of their body, and for the further consideration of five dollars, ($5\frac{00}{100}$,) the current money of the United States of America, to him in hand paid by the said James Green for the use and upon the trust hereinafter mentioned at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath given, granted, bargained, and sold, enfeoffed, released and confirmed, and by these presents

8 doth give, grant, bargain and sell, alien, enfeoff, release and confirm unto the said James Green, his heirs and assigns, all the following described pieces and parcels of ground lying in the said city of Washington, in the said District of Columbia, fronting thirty-three (33) feet on north K street, and running back of that width at right angles with the line of said K street, the depth of this lot being lot numbered three (3) in square numbered four, (4,) as laid down in the authorized plan of said city, the lot hereby intended to be conveyed being the western thirty-three (33) feet of said lot. Also, all that parcel of ground situated in

Washington City aforesaid, being the eastern part of lot numbered three (3) in square numbered four, (4,) divided as follows: beginning at the southeast corner of said lot, fronting on K street north, running westwardly on the line of said street about seventeen feet to the line dividing it from the portion of the said lot formerly sold to James H. Reed by John Dixon, and running back to the rear line of the lot the uniform width of said seventeen feet, being the said premises
9 which the Francis Green, by certain indenture dated the sixteenth day of July, A. D. 1866, and recorded in the office for the recording of deeds for the said city of Washington, D. C., July 30th, A. D. 1866, and recorded among the land records in Liber R. M. H., No. 19, folio 107, &c., granted and conveyed the above-described premises to the said Thomas Green, his heirs and assigns, in fee. And the other of said lot being the same premises which Samuel C. Wroe, by his certain indenture, dated the first day of December, A. D. 1864, and which said deed is recorded on the seventh day of December, A. D. 1864, among the land-records of the District, granted and conveyed the described premises to the said Thomas Green in fee. And, also, all that other piece or lot of ground with the improvements thereon erected, and situate and in Georgetown in the said District of Columbia, in Thomas Beale's addition to said town, being part of lots one hundred and two and one hundred and three in the said addition; beginning for said parcel intended to be hereby conveyed at the southwest corner of said lot numered one hundred and two, being at the north-
10 east intersection of Beale's and Green streets, and running thence with Green street north twenty-six feet, thence east ninety feet, thence south twenty-six feet and thence west ninety feet with Beale street to Green street and the point of beginning, being the same premises which Benedict Hutchins and Elizabeth, his wife, by certain indenture, dated June 8th, 1865, granted and conveyed the said described premises to the said Thomas Green, his heirs and assigns, in fee, together with all rights, privileges, appurtenances, hereditaments to the same thereto belonging, or in any way appertaining, and the remainders and issues, rents, reversions, and profits thereof, and all the right, title, and interest and estate of him, the said Thomas Green, in and to the same. To have and to hold the said pieces of ground and premises with the appurtenances above described and conveyed and intended to be conveyed, all and singular, unto him, the said James Green, his heirs, assigns, forever in trust, nevertheless for the following use and purposes, and none other, that is to say, for the sole and separate use of Catharine Green and
11 for the children of the said Thomas Green, and Catherine Green during her life, in absolute right and property, as if she was a femme sole and free and clear of any right, title, and estate, whether as tenants by the courtesy or otherwise of her present or any future husband, and from his control from any liability for his debts, and upon trust and to hold and dispose of and convey the said premises in such manner and to such uses, interest, and purposes as she, the said Catharine Green, may from time to time direct by any testament, under or as may be directed by any last will and testament, or other testamentary writing of what form soever, which she, the said Catherine Green, notwithstanding her present or any future coverture, shall and may direct, limit, and appoint; and in the absence of any such direction, limitation, or appointment, or subject thereto, or remainder after her death, to her heirs at law of the said Catharine Green. And the said Thomas Green, for himself and his heirs, covenants and agrees to and

with the said James Green, his heirs and assigns, to warrant and defend the said lot or parcel of land and premises, with the appurtenances, from and against him, the said Thomas Green, and all persons claiming, or to claim by, from, under, or through him, her, or them, or any of them.

In testimony whereof, the said Thomas Green hath hereunto set his hand and affixed his seal the day and year first above mentioned.

[SEAL.] THOMAS GREEN.

Signed, sealed, and delivered in presence of—
CHARLES WALTER,
STEWART LUNINGTON.

DISTRICT OF COLUMBIA,
County of Washington, sct.:

I, Charles Walter, a notary public in and for the county aforesaid, do hereby certify that Thomas Green, party to a certain deed, bearing date on the 15th day of January, in the year one thousand eight hundred and sixty-seven, and hereunto annexed, personally appeared before me at my county aforesaid, the said Thomas Green being personally well known to me as the person who executed the said deed, and acknowledged the same to be his a't and deed. Given under my hand and seal this 15th day of January, 1867.

[SEAL.] CHARLES WALTER,
Notary Public.

Exhibit G. Q. to bill.

Stamp $c.]

JAMES GREEN ET AL. *to* W'M A. WARD. } Trust. Recorded 29th December, 1868.

This indenture made this twenty-first day of November, in the year of our Lord one thousand eight hundred and sixty-eight, between James Green, of the city of New York in the State of New York, trustee, and Thomas Greene, and Catharine Green, his wife, of the city of Washington in the District of Columbia, of the first part, and William A. Ward, of said city of Washington, of the second part.

Whereas the said Thomas Green being justly indebted unto Lewis S. Wells, of said city of Washington, in and for the sum of six thousand dollars, hath made, signed and delivered unto the said Lewis S. Wells one certain promissory note bearing even herewith date for said sum of six thousand dollars, and payable to the order of said Lewis S. Wells in six months after date with interest from date; and in order to secure the payment of said note with the interest thereon, the said Catharine Green hath requested and directed the said James Green, as trustee, to execute these presents, in evidence whereof she hath become a party hereto, and said parties of the first part do here execute these presents:

Now therefore this indenture witness'th that the said parties of the first part, for and in consideration of the premises aforesaid, and further the sum of one dollar, in lawful money of the United States, to them in hand paid by the said party of the second part at and before the sealing and delivery of these presents, the receipts whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release, and convey unto the said party of the second part, his heirs and assigns, all those certain pieces or parcels of ground being known and described as follows:

All of lot numbered three (3) in square numbered four (4) in said city of Washington, and parts of lots numbered one hundred and two (102) and one hundred and three (103), in Beale's addition to Georgetown, in said District of Columbia, beginning for the said parts of lots at the southwest corner of said lot numbered one hundred and two (102), the same being the northeast of intersection of Beall and Green
16 streets, thence with Green street north twenty-six (26) feet, thence least ninety (90) feet, thence south twenty-six (26) feet, and thence west along the line of Beall street ninety (90) feet to the place of begining, together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in any wise appertaining, and all the estate, right, title, interest, and claim, either at law or in equity, or otherwise, however, of the said parties of the first part, of, into, or out of the said pieces or parcels of ground and premises.

To have and to hold the said pieces or parcels of ground and premises and appurtenances unto and to the use of the said party of the second part, his heirs and assigns.

In and upon the trusts nevertheless hereinafter mentioned and declared; that is, in trust to permit the said James Green, as trustee,
17 his heirs or assigns, to use and occupy the said described premises, and the rents, issues, and profits thereof to take, have, and apply to and for his or their sole use and benefit, until default be made in the payment of said note, interest thereon, or any proper costs, charge, commission, half commission, or expense in and about the same. And upon the full payment of all of said notes, and the interest thereon, and all other proper costs, charges, commission, half commissions, and expenses at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said James Green, as trustee, his heirs or assigns, to his or their cost.

And upon this further trust, that upon default being made in the payment of the said note or interest thereon or any proper cost, charge, commission, half commission, or expense in and about the same, then
18 and at any time thereafter to sell the said pieces or parcels of ground and premises at public action upon such terms and conditions and such time and place, and after such previous public advertisement as the said party of the second part, as trustee, or his heirs in the execution of this trust, shall deem advantageous and proper, and to convey the same in fee simple to and at the cost and purchase or purchasers thereof, who shall not be required to see the application of the purchase-money, and of the proceeds of said sale or sales; first, to pay all proper costs, charges, and expenses, and to retain as compensation a commission of five per cent., or the amount of sale or sales; secondly, to pay whatever may then remain unpaid of said note and the interest thereon, whether the same shall be due or not; and, lastly, to pay the remainder, if any, to said James Green, as trustee, his heirs or assigns.

19 In testimony whereof the said parties of the first part have hereunto set their and seals on the day first hereinbefore written.

JAMES GREEN, *Trustee.* [SEAL.]
THOMAS GREEN. [SEAL.]
CATHARINE GREEN. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN C. COX,
C. H. CLAYTON.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, John C. Cox, justice of peace, in and for the county aforesaid, in the said District, do hereby certify that James Green, Thomas Green, and Catherine Green, his wife, parties to a certain deed, bearing date on the twenty-first day of November, A. D. 1868, and hereto annexed, personally appeared before me, in the county aforesaid; the said James Green, and Thomas Green, and Catherine Green, being personally
20 well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed; and the said Catherine Green, being by me examined privily and apart from husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and seal this 26th day of November, A. D. 1868.

JOHN C. COX, [SEAL.]
Justice of Peace.

Restraining order.—Filed Dec. 1, 1870.

Let the application for injunction be heard on Tuesday, the 6th proximo, and meanwhile a temporary injunction issue as prayed.

By the court.

MAC ARTHUR, *Justice.*

DEC'R 2, 1870.

21 *Summons to answer.—Issued December 1st,* 1870.

In the Supreme court of the District of Columbia, December 1st, 1870.

CATHERINE GREEN ET AL. *vs.* THOMAS GREEN ET AL. } No. 2179. Equity dock. 10.

The President of the United States to Thomas Green, James Green, George W. Wells, and William A. Ward, defendants.

You are hereby commanded to appear in this court, at its first special term, occurring twenty days after service of the subpœna, and answer the exigency of the bill, under pain of attachment, and such other process of contempt as the court shall award.

Witness: D. K. Cartter, chief justice.

[SEAL.] R. J. MEIGS, *Clerk.*

MEMORANDUM.—That the defendants are to enter their appearance in this suit in the clerk's office on or before the special term to which this writ is returnable; otherwise, the bill may be taken for confessed.

22 *Marshal's return.*

"Summoned W. A. Ward, not to be found the others.

A. SHARP, *Marshal.*"

DEC'R 2D, 1870.

Injunction.—Issued Dec'r 22, 1870.

GREEN *vs.* GREEN ET AL. } No. 2197. Equity docket 10.

The President of the United States to the defendant, William A. Ward, greeting:

For causes and reasons set forth and shown in the bill filed in this cause, you are hereby enjoined and strictly prohibited, you, your agents, or attorneys, from selling, or attempting to sell, any part of the property described in the deed of trust to you, referred to in this cause, from James, Thomas, and Catherine Green, except for the life interest of said Catherine Green, in one undivided third of said property, until the further order of the court.

Hereof fail not, under pain of attachment, and such other process of contempt as may be issued by the court against you.

Witness: D. K. Cartter, chief justice, &c.

R. J. MEIGS, *Clerk.*

"Service acknowledged.

W'M A. WARD, *Trustee.*"

DEC'R 22, 1870.

23 *Answer of Lewis S. Wells.—Filed Dec. 6, 1870.*

In the supreme court of the District of Columbia.

CATHARINE GREEN, MARY CATHARINE GREEN, and Alice Green, *vs.* THOMAS GREEN, JAMES GREEN, GEORGE W. Wells, & W'm A. Ward. } In equity. No. 2197. Doc. 10.

The seperate answer of Lewis S. Wells to the bill of complaint in the above-entitled cause exhibited.

Respondent, saving and reserving to himself all and all manner of exceptions to the said bill for the manifold errors and inaccuracies therein contained, for answer thereto or to so much thereof as he is advised it is material for him to answer, answering says:

I. That upon information and belief he admits that the com-
24 plainant Catharine is, as is alleged in said bill, the wife of Thomas Green, one of the defendants in this suit, and that the complainants, Mary Catharine and Alice Green, are children of said Thomas and Catharine Green, and are under age.

II. That he admits on information and belief that the parties to the said bill are all residents of the District of Columbia.

III. He admits that the paper writing marked Exhibit G 1 is a certified copy of a certain deed made by said Thomas Green to James Green (another of the defendants in this suit) on the 15' of January, 1867, and also admits that the property therein described was, as is alleged in said bill of complaint, conveyed by said Thomas Green to the said James Green, his heirs and assigns, in trust, as alleged in said bill of complaint; but denies that said bill has fully disclosed and suf-
25 ficiently set forth the said trust; and that the said trust may be fully apparent to his honorable court this respondent avers that

the said property, by the said deed from Thomas to James Green, was conveyed to the said James Green, his heirs and assigns, forever, upon the following trust: that is to say, in trust, nevertheless, for the following uses and purposes, and none other: that is to say, for the sole and separate use of said Catharine Green, and for the children of the said Thomas Green and Catharine Green during her life, in absolute right and property, as if she was a feme sole, and free from and cleare of any right, title, and estate, whether as tenant by the c'urtesey or otherwise, of her present or any future husband, and from his control from any liability for his debts, and upon trust, and to hold and dispose of, and convey the said premises in such manner and such uses, intents,
26 and purposes as the said Catharine Green "may from time to time direct by any testament under, or as may be directed by any last will and testament, or other testamentary writing of what form sovever, which she the said Catherine Green, notwithstanding her present or any future coverture, shall and may direct, limit, and appoint; and in the absence of any such direction, limitation, or appointment, or subject thereto, in remainder after her death to her heirs at law of the said Catharine Green."

IV. This respondent cannot from knowledge, information, or belief on his part, either admit or safely deny, that the "complainants are (as alleged by them) advised that according to the true construction of said deed of settlement, said Catharine Green was entitled only to an estate for life in said premises as joint tenant or tenant in common with her children;" but if they are so "advised," then this respondent upon
27 information and belief avers they are erroneously and badly advised. Further answering, this respondent admits that in addition to the estate (whatever that may be) which the said Catharine took under the aforesaid deed in the property therein described, she took also under said deed a power to appoint by last will and testament as fee-simple estate in said property; and further admits that, so far as her said power of appointment is alone concerned, she is not by the terms of the said conveyance from Thomas to James Green expressly and in terms (however it may be according to the actual interest and meaning of the conveyance) authorized to exercise the power of appointment as a mere power by deed; and with respect to the further averment of the complainants in the 4th paragraph (or section) of their said bill, to wit:
"Nor was the said Catharine authorized by said deed to make
28 any conveyance of said premises," this respondent, answering, says that treating said averment as an averment of fact, he denies that it is true; and treating it as an averment of a legal proposition, he excepts to it, and prays to be allowed the same benefit and advantage under his said exception as he might or could have by or under a demurrer or otherwise.

V. With respect to the averment in the 5th paragraph (or section) of said bill of complaint, to wit, that the said Catharine was induced improvidently to attempt the execution of said power of appointment by deed, and for that purpose on the day of 1868, joined in a deed made by her trustee, said James Green, which purported to convey said property to William A. Ward, "in trust to receive the payment of a certain debt of her husband, said Thomas Green, to George W. Wells;"
29 this respondent answering says that from the paper writing referred to in said averment, and which is marked Exhibit G 2, and filed with said bill of complaint, that he infers that in their said averment the complainants have confounded or confused persons and names, and that instead of George W. Wells they intended their said averment to apply

to Lewis S. Wells, the respondent, and thus inferring, he answering said, "averment denies that 'the said Catharine was induced improvidently to attempt the execution of said power of appointment,' by her said deed to William A. Ward, and also denies that she attempted at all, either improvidently or otherwise, to exercise said power of appointment by said deed, and lastly in this connection he denies that she did in fact exercise her power of appointment by said deed; and contrary thereto he avers that on or about the 14' day of February, 1868, this re-
30 spondent was possessed of a valuable leasehold interest and estate in certain real property situated in the city of Washington, and also certain paintings, furniture, stock, and fixtures belonging to a restaurant and hotel, which the said Thomas Green, husband of said Catharine, was desirous to purchase, but was unable to purchase for cash, and which this respondent was willing to sell and assign to him on credit, provided the amount to be paid therefor was satisfactor'y secured, and the said Catharine being, as this respondent believes, anxious that her said husband should purchase said leasehold interest, &c., upon the terms agreed upon between her said husband and this respondent, readily consented to aid him in his effort to purchase the same by securing the said purchase-money by a deed in trust upon the property referred to in said bill of
31 complaint, and which she then claimed to own in fee simple, and which this respondent, after first becoming satisfied that her said claim of ownership was well founded, agreed to accept as a security for the due payment of said purchase-money; and thereupon this respondent sold and assigned his said leasehold, interest, &c., to the said Thomas Green and received on account of the purchase-money the four promissory notes of the said Thomas Green bearing date the said 14 of Feb'y, 1868, and payable with interest, one for $2,000 on the 14 of May, 1868; one for $1,000, Aug. 14, 1868; one for $2,000, Sept. 14, 1868; and the other for $2,000 in Feb. 14, 1869; secured by a deed of trust to George W. Wells, conveying the property mentioned in the said bill of complaint, all of which will more fully appear from the said deed which is duly recorded among the land records of Washington County, in the District
32 of Columbia, in Liber E. C. E. No. 28, page 124, one of said records; that the said Thomas Green entered into possession of the said leasehold interest, and estate, &c., so sold and assigned to him and occupied the same with his family, and carried on the business of a restaurant-keeper therein, which said business furnished him the principal means of subsistence for himself and his family; that, afterwards, the said Thomas Green having paid a portion of the said indebtedness on his part to this respondent for the accommodation of the said Green, and to carry into effect the better, certain arrangements between said parties, it was agreed that a new note should be given for the then amount of said indebtedness, to be secured in a similar manner and by a conveyance in trust of the same property, and accordingly a new
33 note for the sum of $6,000 was made by the said Thomas Green and delivered to this respondent on the 20th day of November, 1868, payable with interest six months after its date, secured by the said deed in trust to William A. Ward, a certified copy of which, marked Exhibit G 2, is as aforesaid filed with said bill of complaint; and further this respondent avers that in the making, execution, and delivery of said deed the said Catharine did not pretend, profess, or intend to execute the "power of appointment" given to and vested in her by and under the aforesaid deed from Thomas to James Green; but on the contrary she claimed under said deed to be the owner of the property therein described in fee simple, and as such owner, she, as the respondent

in good faith believes, joined in the said deed in trust to William A. Ward with the single intent and sole purpose of conveying to him her own estate, which she then claimed in fee simple in said property, to
34 secure the faithful payment of the aforesaid promissory note, and in and upon the other trusts set forth and declared in said deed in trust to said Ward. And this respondent submits that at law, in equity, and in good conscience the said Catharine is estopped by her said deed from now denying that she had at the time of its execution the right to execute it.

VI. This respondent admits that the debt due him from Thomas Green or his aforesaid promissory note being now overdue, the said William A. Ward has, by the direction of this respondent, advertised the said premises for sale, in pursuance of said deed of trust.

VII. This respondent does not know whether or no the "complainants are advised that said deed of trust is wholly void in equity, being wholly unauthorized by the terms of the settlement to the use of complainants, that it was not so executed as to pass even the
35 interest of said Catharine Green in said property, but in no other event could be effectual to pass more than her undivided interest for the term of her life;" and therefore he can neither admit nor safely deny that such advice has been given to said complainants; but if complainants have received such advice, then this respondent, on information and belief, says they have been erroneously advised.

VIII. "Nevertheless (say the complainants) said deed of trust to Ward may be held to pass the legal title in fee simple in said property, and any purchaser under said deed may be held to acquire the legal title and would thus be enabled to maintain an ejectment for said property;" and with respect to this averment respondent says upon information and belief that it rightly indicates the legal effect of the deed in trust to Ward; and further he admits that the legal consequences mentioned in said averment as likely to result from the execution
36 of said deed in trust, not only may, but certainly will, be held to flow from its execution, if James Green, the trustee of Catharine, united with her, and this respondent avers and charges that he did unite with her in the execution of the deed in trust to Ward, under her direction, in good faith and for the purpose of enabling her to furnish a satisfactory security for the payment of the aforesaid promissory note, by a valid lien both upon the legal and equitable estate in said property; and complainants further aver in this connection that, "Against which (meaning said ejectment) complainant's power entitled in equity might not be able to appear a legal bar, and then irreparable injury might result to them if the sale shall be allowed to proceed as advertised by said trustee;" and with respect to the last-mentioned averment this respondent says that he excepts thereto, and prays the same
37 benefit and advantage under his said exceptions, as he might or could have by demurrer or otherwise.

And having answered as he is advised, he prays to be hence dismissed with his reasonable costs, and he as in duty he will ever pray, &c.

LEWIS S. WELLS.

I do solemnly swear that I have heard read the answer by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

LEWIS S. WELLS.

Subscribed & sworn to before me, Dec. 6th, 1870.

R. J. MEIGS, *Clerk.*

38 *Answer of W'm A. Ward.—Filed Dec.* 6, 1870.

In the supreme court of the District of Columbia.

CATHARINE GREEN ET AL. *vs.* WILLIAM A. WARD ET AL. } In Equity, No. — Dec. 10.

The separate answer of William A. Ward to the bill of complaint against him and others in the above-entitled cause exhibited.

This respondent, saving and reserving to himself all and all manner of exception to the said bill, for the manifold errors and inaccuracies therein contained, for answer thereto, or to so much thereof as he is advised it is material for him to answer, answering says:

I. That it is not true, as is stated in said bill of complaint, that the said Catharine Green with Thomas Green, her husband, and James Green, on the twenty-first day of November, 1868, or at any other time, conveyed to him any property in Georgetown and the city of
39 Washington in trust to secure a debt due and owing to one George W. Wells, of the said city of Washington.

II. That on the said twenty-first day of November, 1868, James Green, trustee, and Thomas Green and Catharine Green, did convey to respondent, by a deed bearing date on that day, certain property in said deed particularly described, to secure a debt of six thousand dollars to one Lewis S. Wells, that is to say, to secure the payment of a certain promissory note, made by Thomas Green and payable to the order of the said Lewis S. Wells in six months after the date of the said conveyance with interest.

III. That respondent knows nothing of the several matters and things set forth and contained in the said bill of complaint, and can neither admit nor deny the same, but submits to the court and is ready to abide by and perform whatever decree or order may be made in the premises.

40 IV. That it is true, as is alleged in said bill of complainant, that he as trustee has advertised the said premises for sale, in pursuance of the terms of said deed of trust, and respondent says he has done so under the order and direction of Lewis S. Wells aforesaid, the beneficiary under the said deed in trust, in compliance with the requirements of the said deed.

And having, as he is advised, fully answered the said bill or so much thereof as it is material for him to answer, he prays to be hence dismissed, with his reasonable costs in this behalf and &c., &c.

W'M A. WARD,
Trustee.

I do solemnly swear that I have read the answer by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief, I believe to be true.

W'M A. WARD,
Trustee.

41 *Answer of Tho's & Ja's Green.—Filed Dec.* 8, 1870.

In the supreme court of the District of Columbia.

GREEN ET AL.
vs.
GREEN ET AL. } In equity. No. 2197.

Joint and separate answer of Thomas Green and James Green to the bill of complaint in this cause filed.

The defendants, saving and reserving, &c., for answer to said bill or so much thereof as is necessary for them to answer, answering saith: These defendants admit the facts set forth and complained of in said bill, and now haveing fully answered said bill, pray to be hence dismissed.

THOMAS GREENE.
JAMES GREENE.

WALLACH,
Sol. for def't.

DISTRICT OF COLUMBIA,
Washington County, to wit:

On this 8th day of December, 1870, personally appeared before
42 me, the subscriber, a justice of the peace in and for the county and District aforesaid, Thomas Green and James Green, above named, and made oath on the Holy Evangelly of Almighty God that the facts stated in the foregoing answer are true, so far as they are stated of his own knowledge, and so far as they are stated on information and belief they believe them to be true.

Sworn and subscribed to before this 8th day of December, A. D. 1870.

T. DRURY, *J. P.* [SEAL.

Replication.—Filed Dec'r 31, 1870.

In the supreme court of the District of Columbia.

CATHARINE GREEN & AL.
vs.
W'M A. WARD, LEWIS WELLS & AL. } No. 2197. Equity docket 10.

The complainant hereby joins issue with the defendant, and will hear the cause on the bill, answer, general replication, & proof, against the said defendant.

WALTER S. COX,
Sol'r for compl't.

43 *Order to hear cause in general term.—Filed April* 14, 1871.

In the supreme court of the District of Columbia.

CATHARINE GREEN
vs.
THOMAS GREEN ET AL. } 2197. Equity docket 10.

By consent of counsel, it is ordered that said cause be heard in general term in first instance.

By the court.

MAC ARTHUR,
Justice.

Proceedings before the supreme court of the District of Columbia, in general term, commencing on the first Monday and 1st day of January, 1872. Present, Chief Justice Cartter only.

SATURDAY, *February* 24, 1872.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter, and Justices Olin, Wylie, Humphreys, and Mac Arthur.

44 CATHARINE GREEN
vs.
THOMAS GREEN ET AL. } 2197. Equity docket 10.

This cause having been argued upon the record from the special term by consent on both sides, and submitted to the court, it is thereupon, upon consideration thereof, ordered, adjudged, and decreed that the provisional injunction granted by the special term by its order of December 22d, 1870, be and the same is hereby made perpetual, and that the defendant W'm A. Ward be and he hereby is absolutely injoined from selling or attempting to sell the property described in the deed of trust to said Ward from James, Thomas, & Catharine Green, except the life interest of Catharine Green in one undivided third of said property. And it is further ordered that the defendants pay the costs of the cause.

And from this decree the defendants, by their solicitor, Mr. Webb, here now in open court, pray an appeal to the Supreme Court of the United States, and the same is allowed.

By order of the court.

45 In the supreme court of the District of Columbia the 14 day of December, 1872.

CATHERINE GREEN ET AL.
vs.
THOMAS GREEN ET AL. } No. 2197. Equity. In error. Docket 10.

Know all men by these presents that we, Lewis S. Wells and W. B. Webb, are bound unto the above-named Catherine Green et al. in the sum of two hundred dollars, to be paid to the said Catherine Green, her executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals, and dated this 14th day of December, 1872.

Whereas the above-named Lewis S. Wells hath prosecuted an appeal

to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Lewis S. Wells shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

LEWIS S. WELLS.
W. B. WEBB.

Sealed and delivered in presence of—
L. P. WILLIAMS.

Approved Dec. 14, 1872.

D. K. CARTTER,
Ch'f Justice.

46 DISTRICT OF COLUMBIA, *to wit:*

I, R. J. Meigs, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages of paper writings are truly copied from the originals on file and of record in the clerk's office of said court, said originals constituting the entire record in an equity cause pending and lately decided in said court, entitled: Catharine Green, Mary Catharine Green, and Alice Green, compl'ts, vs. Thomas Green, James Green, Geo. W. Wells, and W'm A. Ward, def'ts. No. 2197. Equity. Docket 10.

Witness my hand and the seal of said court this 14th day of December, 1872.

[SEAL.] R. J. MEIGS, *Clerk.*

(Indorsement on cover:) No. 375. Thomas Green, James Green, George W. Wells, & W'm A. Ward, appellants, vs. Catharine Green, Mary Catharine Green, and Alice Green. District of Columbia, sup. court. Filed 17th December, 1872.

Supreme Court of United States.

THOMAS GREEN, JAMES GREEN, LEWIS S. WELLS, and WILLIAM A. WARD, *Appellants.*

v.

CATHARINE GREEN, MARY CATHARINE GREEN, and ALICE GREEN.

No. 95.

APPELLANTS' BRIEF.

LEWIS S. WELLS,
W. B. WEBB,
for appellants.

S. & R. O. Polkinhorn, Printers, D st., near 7th.

Supreme Court of United States.

THOMAS GREEN, JAMES GREEN, LEWIS S. WELLS, and WILLIAM A. WARD, *Appellants.*

v.

CATHARINE GREEN, MARY CATHARINE GREEN, and ALICE GREEN.

No. 95.

APPELLANT'S BRIEF.

The bill was filed in this cause in the court below, for the purpose of enjoining a sale under a certain deed of trust (Exhibit G. Q., record, p. 4) exhibited with the bill, and further for the purpose of having said deed set aside and declared void.

The bill also seeks to have the rights of the complainants under the deed of settlement, exhibited with said bill as exhibit G^1, thereto, construed and ascertained by the court, and concludes with a prayer for general relief. Record, pp. 1 and 2.

The allegations of the bill are that Thomas Green, one of the complainants, conveyed certain property in Georgetown and Washington to James Green in trust for the sole and separate use of Catharine Green, the wife, and for the children of the said Catharine and Thomas during the life of said Catharine, with power to dispose of and convey the same in such manner and to such uses as the said Catharine might by any last will and

testament direct and appoint, and in absence of any such appointment in remainder after her death to her heirs at law; that according to the true construction of said deed Catharine Green is entitled only to an estate for life in said property as joint tenant or tenant in common with her children, with a power in her to appoint the fee-simple therein after her death, by last will and testament, and by that means only; that by the deed of trust sought to be set aside she has attempted to execute the power of appointment *by deed*, improvidently and unadvisedly, and that said deed of trust is utterly void in equity, wholly unauthorized by the terms of the deed to James Green, before referred to; that the effort to make sale of said property under it should be enjoined, and said deed declared to be utterly void and of no effect. R. pp. 1, 2.

The defendant, Lewis S. Wells', answers to these allegations, that on or about the 14th of February, 1868, he was possessed of a valuable leasehold interest and estate in certain property in the City of Washington, together with valuable personal property which he agreed to sell to Thomas Green, complainant, provided the amount to be paid therefor was satisfactorily secured, that Catharine Green desirous that the purchase might be effected by her husband, consented to aid him therein by securing the purchase money upon the property referred to in the bill of complaint which she claimed to own in fee-simple, and defendant satisfied that her claim of ownership to the property was well founded, agreed to accept the security offerred in payment for his leasehold interest, estate and personal property, before mentioned, and accordingly sold the same to Thomas Green, taking his note at six months for the purchase money secured by the deed of trust to Ward, (R. p. 12 13,) in which James Green, Thomas Green, and Catharine Green unite; that in

making said deed of trust to Ward, Catharine Green did not pretend, nor intend to execute the power of appointment given her under the deed to James Green, but claimed to be the owner of the property mentioned therein in fee-simple, and united in the deed to Ward for the purpose of securing the payment of the note given by her husband to the defendant in the purchase of the leasehold interest, estate and personal property sold to him as aforesaid; that the note has fallen due and is unpaid, and that he has ordered Ward, the trustee, to proceed to sell under the deed for the purpose of obtaining his money, as he believes he had a perfect right to do. Other answers were made by the other defendants, but are only formal; replication was filed; no proof taken, and the cause was heard upon bill, answers and exhibits.

The court decreed that Ward should be perpetually enjoined from selling under the deed to him, anything more than the life interest of Catharine Green in one undivided third of said property, and from this decree an appeal was taken to this court. R., p. 13.

There can be no question in this case as to the meaning of the parties to the deed to Ward. It is evident that that deed was made to secure a debt to Wells; and that the wife became a party to it with a view to that security. The question is upon the interpretation of the deed of settlement from Thomas Green to James Green. R. p. 2.

The portion of the deed from Thomas to James Green, material to the issue in this cause, is in the words following: (Record pp. 2 and 3.)

"This indenture, made this 15th day of January, in the year one thousand eight hundred and sixty seven, between Thomas Green of the City of Washington, in

the District of Columbia, of the first part, and James Green of the City of Washington, of the second part; witnesseth, that the said Thomas Green, for, and in consideration of the love and affection for his wife, Catharine Green, and for the lawful heirs lawfully begotten of their body, and for the further consideration of five dollars, ($5) the current money of the United States of America, to him in hand paid by the said James Green, for the use and upon the trust hereinafter mentioned at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath given, granted, bargained and sold, enfeoffed, released and confirmed, and by these presents doth give, grant, bargain and sell, enfeoff, release and confirm, unto the said James Green, his heirs and assigns" (here follows the description of the property conveyed.)

"To have and to hold the said pieces of ground and premises, with the appurtenances above described and conveyed, and intended to be conveyed, all and singular, unto him, the said James Green, his heirs, assigns, forever in trust, nevertheless for the following uses and purposes, and none other, that is to say, for the sole and separate use of Catharine Green, and for the children of the said Thomas Green and Catharine Green during her life, in absolute right and property, as if she was a *feme sole*, and free and clear from any right, title and estate, whether as tenants by the curtesy or otherwise of her present or any future husband, and from his control from any liability for his debts, and upon trust and to hold, and dispose of, and convey the said premises in such manner and to such uses, interest and purposes as the said Catharine Green, may from time to time direct by any testament, under or as may be directed by any last will and testament, or otherwise testamentary writing of what form soever, which she, the said Catharine

Green, notwithstanding her present, or any future coverture shall, and may direct, limit and appoint; and in the absence of any such direction, limitation, or appointment, or subject thereto, or remainder after her death, to her heirs at law of the said Catharine Green."

ASSIGNMENT OF ERROR.

The decree of the court, R. p. 13, is erroneous, in that it makes the provisional injunction, granted December 22d, 1870, restraining the trustee, Ward, from selling under the deed to him, R. p. 4, perpetual, and absolutely forbids him from making any sale of the property in said deed, except the life interest of Catharine Green in one undivided third part thereof.

The grantor conveyed to a trustee, his heirs and assigns all his real estate in the District of Columbia "in trust for the sole and separate use of" his wife "and for the children of" the grantor and his wife "during her life" with power to appoint the inheritance by will and "in the absence of any" "appointment or subject thereto remainder after" "her death to her heirs at law." The deed is most inartificially drawn, but this appears to be its meaning.

The trustees afterwards conveyed said property by deed of trust in which the husband and wife joined to secure the payment of the purchase money for a valuable leasehold which was purchased for the support of the family, and we contend that under the first deed the wife became the owner of the property in fee-simple for this reason, viz: Because the estate granted to her for life and the remainder "to her heirs at law" being both equitable united in her as an estate of inheritance under

the rule in Shelly's case. This rule is uniformly recognized in Maryland and the District of Columbia.

The legal fee is conveyed to the trustee. It is given to him and his heirs and comprehends the whole estate. The deed being by bargain and sale confers upon him the entire legal estate which exhausts the entire estate and makes the other limitations created thereby, the one to the wife for life and the remainder to her heirs at law both equitable estates. Croxall v. Sherard, 5th Wall, 281.

Mathews v. Ward, 10. G. and J., p. 443.

It is necessary that the trustee should have the entire legal estate in order to enable him to properly perform the functions vested in him by the grantor, to wit: "to convey" such estate as the wife might by will limit and appoint which might comprehend the entire fee.

Neilson v. Lagow, et al., 12 How., p. 98.

The grantor to make his intent more manifest to confer upon the trustee the entire legal interest in the estate after giving it to him and his heirs, adds these words—"all the right, title, and interest, and estate" of himself "in and to the same."

In the following cases in which trusts were limited similar to those in the present case, it was held that the wife took the equitable estate in fee-simple.

Tillinghast v. Cogeshall, 7 R. Island, p. 383.
Armstrong v. Lyon's heirs, 12 Ohio, p. 278.
McWhorster v. Agnew, 6 Paige, 111.

The trust is not strictly for the sole and separate use of the wife, but for the joint use and benefit of herself and the children, but the estate is given to the wife alone, in the words of the deed, "during her life in absolute right and property as if she was a *feme sole*." "The

absolute interest," says Fearne, "is an interest which comprises the entire ownership of which the entirety of an hereditament is susceptible, and applies whether the interests are legal or equitable, the word property or ownership in the case of a legal interest referring to a legal ownership, and the same word in the case of an equitable interest referring to the equitable or beneficial ownership." No estate can therefore exist in the children, their interest amounting to nothing more than a trust or confidence in the wife for their benefit. But even if the life estate was vested in the wife and children jointly the remainder being to the heirs at law of the wife, the rule in Shelly's case would nevertheless apply.

Greenleaf's Cruise, vol. 2, p. 386.

Suppose, on the other hand, that the legal estate in fee is not executed in the trustee, but is executed in the wife for life—the remainder in that case "to her heirs at law" would also be an executed estate and the two estates would unite and form an estate of inheritance in the wife.

The trustee has no active duties to perform in regard to the life estate; and, apart from what would seem to have been the intention of the grantor, and the legal effect of the nature of the conveyance, there would seem to be no necessity that the legal estate should vest in him.

If there is no separate use in the wife, his intervention would not be necessary to protect her against the marital rights of the husband, and in point of fact the husband has by the terms of the deed divested himself of all his marital rights.

The wife's estate might therefore be considered an executed one, and there is express authority to this point

even in cases where the life estate was limited to the separate use of the wife.

See Williams v. Waters, 14 Mes. and Wels., 166.
Douglass v. Congreve, 1 Beavans, 59, and
South v. Alleine, 1 Salk., 228.

The rule in Shelly's case applies alike to equitable as to the legal estates in case of executed trusts.

Washburn on Real Prop., vol. 2, 455.
Croxall v. Sherard, 5 Wall, 281.
Wm. Real Prop., 136; Tud. leading cases on Real Property, 503.

Where both estates are legal, the fact that a trust is attached to one of them will not prevent the rule from applying.

Washburn on Real Prop., vol. 2, p. 257, Tud. lead. cases, on Real Prop., 484.
Douglass v. Congreve, 1 Beavans, 59 sc—4 Bing., N. C., 1.

Washburn says—that a grant or devise to a married woman to receive the rents for her separate use is generally considered in trust and not an executed use. Yet it may be controlled by the language of the grant or devise. Vol. 2, page 435.

Technical words used in an executed trust are taken in their legal sense.

Wright v. Pearson, 1 Eden. 125; 19th Md. 197.

Trust must be for the benefit of the wife exclusively of all other persons, for if the gift is to trustees for the benefit of the wife and her children, it will not be a separate estate. 4 Ird. Eq., 236; 2 Ird. Eq., 630; 6 Ala., 418; 12 Ala., 652; 8 Yng., 33; Perry on Trusts, sec. 651.

Where the rule in Shelly's case applies, it is a rule so imperative that though there be an express declaration that the ancestor shall have only a life estate, it will not defeat its union with the subsequent limitation to his heirs. Washburn on Real Prop., 2d——558, Tud. lead. cases on Real Property, 488.

But it would seem, in this case, that to apply the rule would be to conform to the grantors intention· At all events there is nothing in the language used by him to indicate that he intended to use the words "heirs at law" in any other than a technical sense. With words of explanation showing a manifest intent of the testator to make them words of purchase or to interpret them as meaning children, they have been so construed, but a mere presumption will not control their legal signification and meaning.

The only expression in the deed that might imply an intention on his part to restrict her estate to a life estate, are the words "during her life," but they must be taken in connection with the words that follow, viz: "in ab- "solute right and property as if she was a *feme sole* and "free and clear from any right title and estate whether "as tenant by the curtesy or otherwise." This language indicates an intention to confer upon her the absolute inheritance, for it is meaningless—if interpreted in any other way, and this intention is made more manifest by conferring upon her the power to will the inheritance and limiting the remainder at her death to her heirs at law in the absence of will or subject thereto.

It is submitted that the case of Ware et al. v. Richardson, 3d Maryland 505, relied on by appellees is unlike the case at bar in many particulars, and that however that may appear, the force of that case is materially weakened by the fact that Le Grand Ch. J., of the

Court of Appeals, and Frick Ch. J. of the Supreme Court for Baltimore, were of an opinion different to that held by the court, on the very question at issue in this case-

The cases are not parallel; the deed in the case in 3d of Maryland was from a stranger to a trustee in trust for the separate use of a feme covert as if sole, (and independent of her husband) during her life, and from and after death to her heirs.

It was held that she had but a life estate, because her estate was an equitable one, and would not unite with the remainder to her heirs which was a legal estate.

The court say that a trust even for a married woman would be an executed use unless the trustee was charged with performance of active functions, and that although the trustee had no active functions to perform, which made it necessary that the legal estate should vest in him, yet, as the purpose of the deed, which was to exclude the marital rights of the husband, could not have been carried out without the active agency of the trustee, it was necessary to imply in him active duties so as to give him the legal estate, for if the estate were vested in the feme covert the marital rights of the husband would be established contrary to the intention of the grantor.

The court say further that had not the estate been limited to her separate use and independent of her husband, it would have vested in her notwithstanding the coverture.

The deed in the present case is from the husband in which he divests himself of all his marital rights, even his right as tenant by the curtesy, evidencing an intention on his part to confer upon his wife more than a mere life estate. The trustee has no active duties to perform except "to convey the estate in case she exer-

cises her right of appointment by will. As the life estate is limited to her "in absolute right and property, as if she was a *feme sole*," and as the husband can have no rights against which it is necessary to have a trustee to protect her estate, the reason given in the other case for vesting the legal estate in the trustee during the life of the wife, viz: to conform to the grantor's intention to exclude the marital rights of the husband, does not apply, and the legal estate for life would vest in her notwithstanding her coverture.

Such being the case, this estate would unite with the remainder to her heirs, which would also be a legal estate and vest in her the absolute fee-simple.

In the case of Douglas v. Congreve, (before cited), the limitation was by will to a married woman for her life, for her independant use and benefit, with remainder to the use of the heirs of her body.

It was contended that, as she was to have the independent use and benefit, it was necessary to have the intervention of the court to enable her to enjoy this right, and that the husband would be converted into a trustee for her so that she would only have the equitable estate during the husband's life. But the court say, that the legal estate is vested in the wife; that the power which the law gives to the husband over the real estate of the wife does not alter the *nature or quality* of that estate, and that it is only with the *marital power* of the husband that the court interferes to secure the wife the independent use of the property.

The case of Williams v. Waters, (also before cited), was a limitation by marriage settlement to similar trustee, and in which the court held that the legal estate for life was vested in the wife notwithstanding the limitation was to her sole and separate use.

If no duty was imposed on the trustee by the deed requiring the legal estate in him, the legal ownership passed to the beneficiary.

2 Jarmon on Wills, p. 199.

If, on the other hand, it is considered that the purposes of this trust cannot be carried out without vesting the legal estate in the trustee, the trust being for the separate use of a married woman, and for the children during her life, then the trustee must have the legal fee, for under her power of appointment, she may appoint a fee, and whatever she appointed it is made his duty " to convey."

The form of deed used produces this same effect; it being by bargain and sale.

In the case of Coxall v. Sherard, 5 Wallace, p. 282, the form of deed was somewhat similar to that used in this case. The consideration being the ten shillings—but the court decided that it operated by bargain and sale, and vested the entire legal fee in the trustee, thereby making all the other limitations created thereby equitable estates.

In a deed by bargain and sale, any pecuniary payment, however small, was considered sufficient to raise a use in the bargainee.

2d Saunders on Uses, 47.

If the limitations are equitable, the rule in Shelly's case also attaches and vests in her the equitable fee.

LEWIS S. WELLS,
W. B. WEBB,
for appellants.

Supreme Court United States.

THOMAS GREEN, ET AL.,
v.
CATHARINE GREEN, ET AL.
} No. 95.

WALTER S. COX,
of counsel for appellees.

S. & R. O. Polkinhorn, Printers, D st., near 7th.

Supreme Court United States.

THOMAS GREEN, ET AL.,
v.
CATHARINE GREEN, ET AL.
No. 95.

STATEMENT AND BRIEF OF APPELLEES.

Thomas Green, by deed dated January 15, 1867, conveyed certain real estate in Georgetown, D. C., to James Green, in fee, in trust "for the sole and separate use of "Catharine Green (wife of Thomas) and for the children "of said Thomas Green and Catharine Green, during "her life, in absolute right and property, as if she were "a *feme sole* and free and clear of any right, title and "estate, whether as tenants by the curtesy or otherwise, "of her present or any future husband, and from his "control and from any liability for his debts, and upon "trust and to hold and dispose of and convey the prem-"ises in such manner and to such uses, interest and pur-"poses as she, the said Catharine Green, may, from time "to time direct, by any testament, under as may be di-"rected, by any last will or testament, or other testa-"mentary writing, of what form soever, which she, the "said Catharine Green, notwithstanding her present or "any future coverture shall and may direct, limit and "appoint; and in the absence of any such direction,

"limitation or appointment, or subject thereto, in re-
"mainder after her death, to her heirs at law of the said
"Catharine Green." (Record, pp. 2, 3.)

On the 21st of November, 1868, James Green, Thomas Green and Catharine Green conveyed the same property to Wm. A. Ward, his heirs and assigns, in trust to secure payment of a debt to Lewis S. Wells.

The debt being overdue, the trustee advertised the property for sale.

Thereupon the bill was filed.

It claims that the deed to James Green gave to Catharine Green only equitable life estate in the property in common with her two children, with power to appoint the fee simple by her will; that she and her trustee had no power to convey in fee-simple, or for any estate, to secure the debt to Wells; that if a sale should be made under said deed, the legal title would pass and the purchaser be enabled to maintain ejectment against Mrs. Green and her children, and irreparable injury might be suffered.

It asks the court to construe the deed of settlement from Thomas Green to James Green and determine the rights of the parties under it, and to enjoin the sale under the deed of trust.

The defendant, Wells, claims that by operation of the rule in Shelley's case, Mrs. Green had a fee-simple estate and her deed was effectual to pass title. It substantially submits this question to the court.

POINTS FOR APPELLEES.

I.

The deed from Thomas to James Green, gave to Mrs. Catharine Green merely an equitable life estate.

Where property is conveyed to a trustee for the separate use of a married woman, the legal estate is not executed in her by the Statute of Uses, but her estate remains equitable. Were it otherwise and were the legal estate vested in her, her husband would have the legal right to collect the rents and profits.

See Clancy on Husband and Wife, p. 256.

Ware, et al., v. Richardson, 3 Md. Rep. 505,

Fearne on remainders. p. 52.

The limitation to the heirs of Catharine Green, on the other hand, gives them a legal estate, as no active duty is devolved on the trustee, with regard to them, which requires the legal estate to remain in him.

II.

Where the particular estate is equitable and the remainder to heirs is legal, or vice versa, the two estates do not unite and become a fee-simple in the tenant for life.

Fearne on Remainders, p. 52, ch. 1, sec. 5, par. 9, *et. sequ.*

III.

Having a life estate only, with a power to appoint by will, she could not direct a conveyance in fee-simple.

Thus, for example, says Story, 2 Eq. Jur. sec. 1393: "if there be an express limitation for life to a married woman, with power to dispose of the same property by will, then her interest will be deemed a partial interest and equivalent to a life estate only, and she cannot dispose of the property absolutely, except in the manner prescribed by the power."

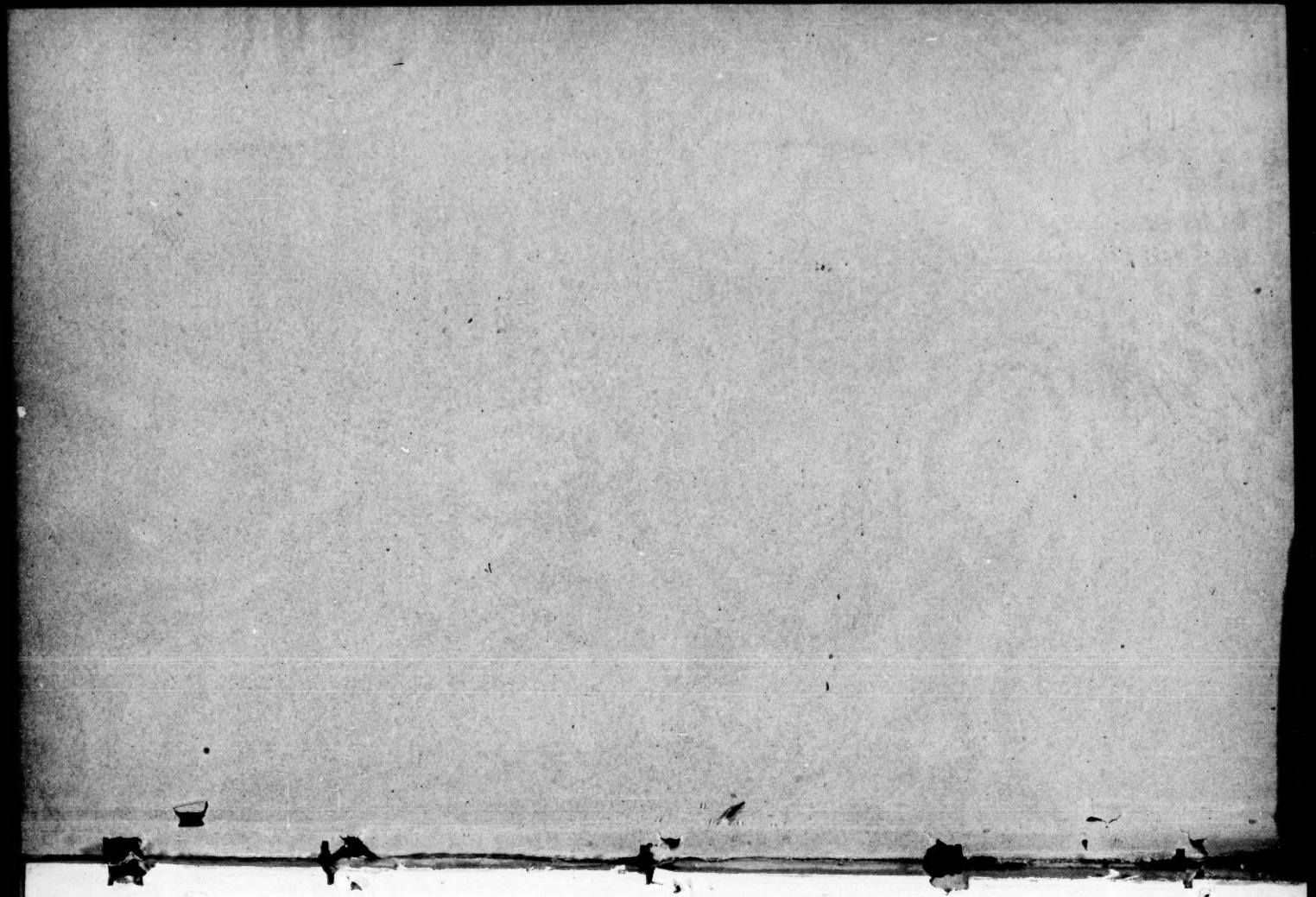
See also, Reid v. Shergood, 10 Ves. 370; 2 Roper on

Husb. and Wife, ch. 20; Calhoun v. Calhoun, 2 Strobh. Eq. 231.

And generally, that a power which is to be executed by will cannot be executed by deed, because the latter is irrevocable and would be an immediate destruction of the power. See 1 Story's Eq., Jur. sec. 173.

IV.

Catharine Green's life estate is only in one undivided third, in common with her two children who hold the other two undivided thirds.

Coke Littleton, Title 32, ch. 24, secs. 15, 43, 46.

WALTER S. COX,
of counsel for appellees.